Supreme Court, U.S.
FILED
AUG 1 1997
CLERK

22

No. 96-779

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ARKANSAS EDUCATIONAL TELEVISION COMMISSION,
Petitioner,

v.

RALPH P. FORBES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

REPLY BRIEF FOR THE PETITIONER

RICHARD D. MARKS
Counsel of Record
ALDEN L. ATKINS
PHILIP A. NICKLES
VINSON & ELKINS L.L.P.
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004-1008
(202) 639-6725
Counsel for Petitioner

August 1, 1997

27pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. MR. FORBES' METHOD OF FORUM ANALYSIS IS IRRECONCILABLE WITH *CORNELIUS'* TEST BASED ON THE GOVERNMENT'S INTENT. 1

II. AETN'S EXCLUSION OF MR. FORBES WAS NOT VIEWPOINT-BASED. 6

III. AETN, OPERATING UNDER POLICIES THAT REQUIRE IT TO FUNCTION AS AN INSTITUTION OF THE PRESS, IS IN AN INHERENTLY ADVERSARY POSTURE TO GOVERNMENT. 9

IV. MR. FORBES' THEORIES FOR CURTAILING AETN'S JOURNALISTIC DISCRETION CANNOT BE LIMITED TO CANDIDATES' DEBATES, BUT WOULD EXTEND TO ALL AETN'S PROGRAMMING DEALING WITH PUBLIC CONTROVERSIES. 13

V. THE REQUIREMENT FOR AETN TO USE PREEXISTING "OBJECTIVE" CRITERIA IN SPONSORING THE DEBATE WOULD BE INCOMPATIBLE WITH FORUM DOCTRINE AND WITH AETN'S ROLE AS AN INSTITUTION OF THE PRESS. 16

VI. THE CANDIDATES' DEBATE WAS NOT GOVERNMENT SPEECH. 18

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Accuracy in Media, Inc. v. FCC, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976) 10

American Party of Texas v. White, 415 U.S. 767 (1974) .. 5

Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) 19

Board of Educ. of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990) 19

Buckley v. Valeo, 424 U.S. 1 (1976) 17

Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) 19

Chisholm v. FCC, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976) 3

In re Codification of the Commission's Political Programming Policies, 7 FCC Rcd 678 (1991), *recon. granted in part*, 7 FCC Rcd 4611 (1992) 3

Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) 3, 17

Community-Serv. Broad. of Mid-America, Inc. v. FCC, 593 F.2d 1102 (D.C. Cir. 1978) 10

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788 (1985) 4, 5, 18

County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) 19

FCC v. League of Women Voters, 468 U.S. 364 (1984) .. 10

Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981) 15

Henry Geller, 95 F.C.C.2d 1236 (1983), *aff'd mem. sub nom. League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984) 3

Keller v. State Bar of California, 496 U.S. 1 (1990) 19

Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 11

Marcus v. Iowa Pub. Television, 24 Med. L. Rptr. 2531, 1996 WL 764143 (S.D. Iowa Oct. 9, 1996) 14

Marcus v. Iowa Pub. Television, 97 F.3d 1137 (8th Cir. 1996) 14, 17

McLaughlin v. Florida, 379 U.S. 184 (1964) 5

Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) 17

Mills v. Alabama, 384 U.S. 214 (1966) 9, 17

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) ... 17

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) .. 11

New York Times Co. v. United States, 403 U.S. 713 (1971) 10, 11

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 2

Political Primer 1984, 100 F.C.C.2d 1476 (1984) 14

Polk County v. Dodson, 454 U.S. 312 (1981) 11

Reno v. American Civil Liberties Union, No. 96-511, 1997 WL 348012 (U.S. June 26, 1997) 9, 10

Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995) 7, 8, 19

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 5

STATUTES

11 C.F.R. § 110.13 16

47 C.F.R. § 73.1941(a)(4) 3

47 U.S.C. § 315(a) 2-3, 14

MISCELLANEOUS

ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975) 11

David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 491 (1983) 9, 12

LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT (1987) 10

WILLIAM J. MCGILL ET AL., THE LANDMARK REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST (1979) . . . 10

Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. (1977) 12

ARGUMENT

I. MR. FORBES' METHOD OF FORUM ANALYSIS IS IRRECONCILABLE WITH *CORNELIUS'* TEST BASED ON THE GOVERNMENT'S INTENT.

As did the Eighth Circuit below, Mr. Forbes and his supporting *amici* argue this case by stating important facts as they would like them to be, rather than as they are in the record, or by ignoring critical facts altogether. By recasting the record, they attempt to ordain the result.

Nowhere is this vice more apparent than in Mr. Forbes' restatement of AETN's intent in holding the debate:

> Under its own factual recitation, [AETN] intentionally opened up government property for *outsiders* to engage in free expression and discourse in the limited context of a congressional debate.

(Resp. Br. at 15; emphasis supplied) This statement is inaccurate because it is incomplete. The record shows repeatedly, without contradiction, that AETN did *not* intend to open the debate to all "outsiders" or even to all Third District candidates. Its intent was specific: to serve AETN's viewers by inviting only those candidates in whom the public was interested.[1/] No testimony in the record supports Mr. Forbes'

1/ Explaining why she accepted her staff's recommendation not to invite Mr. Forbes, Ms. Howarth testified: "[My staff] had done some research, checked out what kind of press coverage [Mr. Forbes] was getting, what kind of popular support he had from the district. . . .[T]he debates were

characterization that AETN was opening the debate to all "outsiders," to all candidates, or to all candidates who qualified for the ballot. When demonstrated public interest in the 1992 election is viewed as the test,[2/] Mr. Forbes is not a "similarly situated" speaker under *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983), as Forbes tries to argue. (Resp. Br. at 18)

This recitation of AETN's intent is consistent with Ms. Howarth's aim of creating a debate that met the FCC's exemption from equal opportunities for on-the-spot coverage of a bona fide news event (App. 103a). The key element in a program exempt from equal opportunities under 47 U.S.C.

---

designed to benefit the viewers of AETN in the Third Congressional District, that we were putting the debate on for their benefit." (J.A. 117) She explained further: "We were trying to reflect what the viewers and the voters were telling us in the information that we had received." (J.A. 119)

2/ Ms. Howarth and Ms. Oliver considered Mr. Forbes' lack of earlier political success. However, their testimony shows that the decisive factors against inviting him were various indicators that Mr. Forbes was receiving no public support in his 1992 campaign. His earlier record as a candidate was simply one of many factors, and not the most important. (J.A. 118-20, 126-27 (Ms. Howarth), 141-42, 144, 152 (Ms. Oliver)) Consequently, Mr. Forbes' emphasis on the fact that he did well in two prior primaries (though never winning any office) (Resp. Br. at 8) is misplaced. It seizes on events before the 1992 campaign, overlooks his overall history of generating little or no public interest, and does not diminish the fact (even in Mr. Forbes' own description (J.A. 95)) that the Third District voters ignored his campaign in 1992.

§ 315(a) is that it be a news program.[3/] Thus, although Ms. Howarth and Ms. Oliver at trial never used the word "newsworthiness," their testimony is devoted to explaining how and why they exercised news judgment in this case. News judgment requires editors to select subject matter, *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 119, 124 (1973) ("*CBS v. DNC*"); and at AETN, by virtue of its written policies, the selection process is based on criteria used generally in the news business. *Programming Policy Statement for AETN* ("*Programming Policy Statement*") (App. 96a ("industry guidelines and standard practices")); *Statement of Principles of Editorial Integrity in Public Broadcasting* ("*Principles*") (App. 64a, 82a ("generally accepted broadcast industry standards")).

By misdescribing AETN's intent as reflected in the record, Mr. Forbes points the Court down a trail that AETN never took. Only by ignoring the intended class – candidates judged to be newsworthy by virtue of their public support in the 1992 campaign – can Mr. Forbes claim that AETN "created a limited public forum for the congressional debate." (Resp. Br. at 18)

Indeed, ignoring the crucial details of AETN's intent creates the predicate for Mr. Forbes' argument that AETN intended to open the debate for a "public discourse" that must

---

3/ *See generally Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976); *Henry Geller*, 95 F.C.C.2d 1236 (1983), *aff'd mem. sub nom. League of Women Voters Educ. Fund v. FCC*, 731 F.2d 995 (D.C. Cir. 1984); 47 C.F.R. § 73.1941(a)(4); *In re Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 684 (1991), *recon. granted in part*, 7 FCC Rcd 4611 (1992).

include all candidates qualified for the ballot in the Third District. (Resp. Br. at 14-16) Certainly AETN intended newsworthy candidates to discuss the campaign. That is a limited discourse. By concentrating on the phrase "public discourse" in isolation from the record testimony, Mr. Forbes asserts that AETN unintentionally opened the debate to discourse by the class of participants as Mr. Forbes would like it defined. This approach would nullify the instruction in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985), that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

Mr. Forbes and various *amici* in fact have proposed a new legal rule that contradicts *Cornelius'* emphasis on the government's intent. This rule works by operation of law rather than by a factual inquiry into the government's intent. Under this rule, and regardless of intent, any state entity that sponsors a candidates' debate must include all candidates who have qualified for the ballot. (Resp. Br. at 15-18) Mr. Forbes and *amici* seek to fortify this new rule with arguments about the importance of third parties in U.S. history and the fact that candidates' speech is protected under the First Amendment. However, these uncontroversial assertions do not obscure the fact that Mr. Forbes' approach can succeed only by departing from the analysis that *Cornelius* demands.[4/]

4/ Mr. Forbes, trying to circumnavigate *Cornelius*, offers strawmen. For example, he argues that AETN sets the Communications Act above the First Amendment when AETN asserts a compelling interest in maintaining licensee control – editorial judgment – over the debate. (Resp. Br. at 24) That simply is not so. Rather, AETN points to this requirement of the Communications Act only as evidence of its intent to control the debate, among other ways, by selecting only newsworthy participants. (Pet. Br. at 25-26, 27-28)

Mr. Forbes' war with *Cornelius* is apparent in his argument that AETN's intent is a "circular argument." (Resp. Br. at 18) A similar point was made in dissent in *Cornelius*.[5/] *Cornelius'* emphasis on intent does give government the option to establish a nonpublic forum when, by choosing differently, it could have opened a limited public forum. But, contrary to the assertions made repeatedly by Mr. Forbes and his *amici*, this does not mean that government is left to trample First Amendment values in a standardless world. (*See* Resp. Br. at 44-45, citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), and similar cases.) Rather, intent under *Cornelius* is bounded by the requirement that government not engage in invidious discrimination. *See generally American Party of Texas v. White*, 415 U.S. 767, 781-82 & nn.13-14 (1974); *McLaughlin v. Florida*, 379 U.S. 184, 190-91 (1964) (courts must determine whether classification is reasonable in light of its purpose or is arbitrary); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

5/ In essence, the Court today holds that the First Amendment's guarantee of free speech . . . reduces to this: when the Government acts as the holder of public property other than streets, parks, and similar places, the Government may do whatever it reasonably intends to do, so long as it does not intend to suppress a particular viewpoint.

Cornelius, 473 U.S. at 814 (Blackmun, J., dissenting) (citation omitted).

In actuality, Mr. Forbes was seeking disparate, especially advantageous, treatment from AETN. As Ms. Howarth testified, he was seeking access to a debate platform to which a candidate was not entitled unless he had already garnered demonstrable public support. (J.A. 119, 123) Ms. Howarth correctly observed that giving in to Mr. Forbes' demand for disparate treatment would have damaged the hard-earned trust AETN had built with its viewers. (J.A. 112)

This analysis also demonstrates why AETN's invitations to Republican Party candidates in other 1992 races cannot be lumped with its treatment of Mr. Forbes. Ms. Howarth testified without contradiction that nomination by a major political party is evidence by itself of significant support, and therefore of newsworthiness. (J.A. 134-39) Mr. Forbes' criticism actually proves AETN's point that it adhered to an editorial process that put the audience's interests first. (J.A. 113)

This is not as bright a line as the test that Mr. Forbes suggests, but it is more practical. *See generally* the *amicus* briefs of the City of New York, the State of New Jersey, and the Commission on Presidential Debates.

II. AETN'S EXCLUSION OF MR. FORBES WAS NOT VIEWPOINT-BASED.

Mr. Forbes argues that, because he has views, any chain of events that results in his exclusion must, perforce, be viewpoint-based. "The question is simply whether the government's actions restricted speakers in a way that favors some viewpoints over others." (Resp. Br. at 30) This argument ignores the jury's special verdict, distorts the record, and confounds this Court's holdings.

Mr. Forbes glosses over the jury's second finding (App. 23a) that AETN did not exclude him from the debate because of objections or opposition to his views. (Resp. Br. at 31) Mr. Forbes' charge that AETN discriminated against him based on his viewpoint runs headlong into the jury's contrary finding. This finding is amply supported by Ms. Howarth's and Ms. Oliver's testimony that – whatever Mr. Forbes' views – he was judged to be of little or no interest to the viewing audience, because people in the Third District had given virtually no support to Mr. Forbes' candidacy. (J.A. 118-20, 126-27, 142-44, 152) Because Mr. Forbes and his *amici* cannot gainsay the jury's finding, there is no reason to override it.

Mr. Forbes and his *amici* argue that his exclusion was viewpoint-based, relying on *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 115 S. Ct. 2510 (1995). But *Rosenberger* supports finding that AETN's decision was not viewpoint-based. In *Rosenberger*, the university expressly excluded funding for a publication on the ground that it was written from a religious viewpoint. Here, in stark contrast, the exclusion of Mr. Forbes had nothing to do with his viewpoint. That is best illustrated by the fact that neither Mr. Forbes nor any of his *amici* identify any viewpoint of Mr. Forbes that was silenced. The record is barren of any description of Mr. Forbes' views.

Mr. Forbes also relies on the dissent in *Rosenberger*, 115 S. Ct. at 2548-49, for the proposition that it is impermissible for government to allow one message while prohibiting responsive messages. (Resp. Br. at 31) However, as the dissent observes,

> The issue whether a distinction is based on viewpoint does not turn simply on whether a government regulation happens to be applied to a speaker who seeks to advance a particular

> viewpoint; the issue, of course, turns on whether the burden on speech is explained by reference to viewpoint.

115 S. Ct. at 2548 (Souter, J., dissenting; reference omitted). Here, exclusion from the debate was explained solely by reference to the lack of discernible public support of and interest in Mr. Forbes in the 1992 election, and – as found by the jury – is *not* to be explained by reference to his views.

Mr. Forbes' analysis also fails to place the question of viewpoint discrimination in the larger context of forum analysis, as *Rosenberger* requires:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

Id. at 2517 (citation omitted). In this case involving a nonpublic forum, the excluded class is not defined by reference to "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* Rather, the class of speech excluded is that of candidates in whom the public had shown little or no interest in the 1992 Third District campaign.

III. AETN, OPERATING UNDER POLICIES THAT REQUIRE IT TO FUNCTION AS AN INSTITUTION OF THE PRESS, IS IN AN INHERENTLY ADVERSARY POSTURE TO GOVERNMENT.

Despite Respondent's unsupported protests to the contrary, an essential element of the press' role is as an adversary of the Government.[6/] As this Court has stated:

> [T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mills v. Alabama, 384 U.S. 214, 219 (1966).

Last term, in *Reno v. American Civil Liberties Union*, No. 96-511, 1997 WL 348012 (U.S. June 26, 1997), this Court reaffirmed that "'[e]ach medium of expression . . . may present its own problems.'" *Id.* at *13 (citation omitted). Further, in deciding cases about broadcasting, the Court relies on historical

---

6/ Respondent attempts to use the very presence of the First Amendment as proof of a non-adversarial relationship between the press and state. (Resp. Br. at 49) Yet the opposite must be true. "[A] press clause was necessary, not to induce the press to provide a check on governmental power, but because it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it." David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 491 (1983).

factors unique to the medium. *Id.* Prominent in the history of public broadcasting in this country is a shameful presidential attack "to curb public affairs programming in public television." WILLIAM J. MCGILL ET AL., THE LANDMARK REPORT OF THE CARNEGIE COMMISSION ON THE FUTURE OF PUBLIC BROADCASTING, A PUBLIC TRUST 44-45 (1979); *see also* LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 129-30 (1987) (describing Administration attacks on public broadcasting's public-affairs programming). This history also includes implacable resistance to efforts by Congress to place special burdens on public broadcasters' editorial prerogatives. *FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984); *Community-Serv. Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (*en banc*); *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

In *New York Times Co. v. United States*, 403 U.S. 713 (1971), Justice Black recognized this historical tension:

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would *remain forever free* to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . .

Id. at 717 (Black, J., concurring; emphasis supplied); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

As an institution of the press, AETN fulfills a role that is classified under these cases as fundamentally adverse to the government. AETN's editorial role correlates directly to the representational role of the public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981).

Alexander Bickel wrote extensively on the fundamental adversarial nature of the relationship between the press and the government, which he refers to as an "adversarial game." In THE MORALITY OF CONSENT he said: "The contest between press and government is in a sense analogous to the collision between prosecutor and defense in our system of the administration of criminal justice. Ours is an adversary, accusatory system, as opposed to the European inquisitorial system." ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 81-82 (1975).[7/]

7/ This perspective illustrates why Mr. Forbes' reliance on *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995) (Resp. Br. at 46), is misplaced. The National Railroad Passenger Corporation ("Amtrak"), the state actor in that case, has a very different mission from AETN. Certainly, Amtrak is not by policy directed to function as an institution of the press and to apply standards generally used in journalism to decisions about ongoing news coverage.

The record demonstrates this inherent adversarial relationship between AETN's editorial functions and the political and administrative organs of the State of Arkansas. AETC adopted the *Programming Policy Statement for AETN* (App. 96a) and the *Statement of Principles of Editorial Integrity in Public Broadcasting* (App. 64a) in order to establish AETN's editorial independence from the State of Arkansas. (Pet. Br. at 8-9) To secure the audience's trust, "[p]ublic broadcasters . . . must operate above suspicion of vulnerability to undue influence." *Principles* (App. 82a); testimony of S. Howarth (J.A. 110, 112, 114-15). The *Principles* exhort public broadcasters to win and maintain viewers' trust through devotion to integrity in programming:

> Editorial integrity is rooted in the traditional American values of freedom of speech and press. Tenaciously and courageously fought for by Revolutionary editors and pamphleteers, these values are codified in the First Amendment to the Constitution.

(App. at 87a-88a).

The fundamental adversarial nature of the relationship between the press and the government has a long legal history in this country, dating to before the nation's establishment. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 538 (1977) ("[O]ne of the most important values attributed to a free press by eighteenth-century political thinkers was that of checking the inherent tendency of government officials to abuse the power entrusted to them."). These values are aimed at preserving the press' potential *at any time* freely to criticize government. *See also* Anderson, 30 UCLA L. REV. at 463-66 (explaining that the concept of free press prior to adoption of the U.S. Constitution

was that the press was free to criticize any part of government, an outgrowth of the hard-won freedom to denounce Britain's colonial government).

Consequently, it matters not, as *amicus* Natural Law Party ("NLP") argues (NLP Br. at 30), that AETN and the private press are only sometimes actually in an adversarial controversy with government. The record shows that AETN is *always* in position to criticize government. Under the *Principles* and AETN's *Programming Policy Statement*, maintaining the freedom to criticize government at any time is central to AETN's mission.[8] Moreover, it is uncontradicted in the record that AETN has successfully, sedulously guarded this freedom; and of course the jury specially found that all AETN's decisions respecting Mr. Forbes were indeed free of any political or administrative influence from the state (App. 22a).

IV. MR. FORBES' THEORIES FOR CURTAILING AETN'S JOURNALISTIC DISCRETION CANNOT BE LIMITED TO CANDIDATES' DEBATES, BUT WOULD EXTEND TO ALL AETN'S PROGRAMMING DEALING WITH PUBLIC CONTROVERSIES.

Mr. Forbes and various *amici* try to portray this as a very narrow case that would affect only political debates sponsored and broadcast by state-entity licensees. (Resp. Br. at 25; Brennan Center for Justice ("Brennan Center") Br. at 7, 12;

8/ "Trustees and station managers must master the intricacies of their legal circumstances and be prepared to seek remedy or exemption to any local or state regulation(s) which impair their ability to assure fidelity to the public trust which their broadcasting license represents." *Principles* (App. 84a).

American Civil Liberties Union ("ACLU") Br. at 5-6, 10-12; Perot '96 ("Perot") Br. at 5)

An editorial decision to exclude a candidate from a debate is no different from a broad range of programming decisions about a vast array of subjects, from elections to ballot issues to other controversies. The record in *Forbes v. Arkansas Educ. Television Comm'n*, 93 F.3d 497 (8th Cir. 1996) ("*Forbes II*"), and the decisions in *Marcus v. Iowa Pub. Television*, 24 Med. L. Rptr. 2531, 1996 WL 764143 (S.D. Iowa Oct. 9, 1996), *injunction pending appeal denied*, 97 F.3d 1137 (8th Cir. 1996), both explore the news judgments that are integral to sponsoring a candidates' debate, whether the broadcaster intends the program to be exempt from equal opportunities under 47 U.S.C. § 315(a)(4), as "on-the-spot-coverage," as in *Forbes II*, or under § 315(a)(2), as a "news interview," as in *Marcus*. (In *Marcus*, the jury specially found that the program was both a "debate," as that term was used in *Forbes II*, and a bona fide news interview program. 1996 WL 764143, at *2.) (The Senate cited *Meet the Press* and *Face the Nation* as examples of programs covered by the exemptions from equal opportunities in § 315 (a). *Political Primer 1984*, 100 F.C.C.2d 1476, 1496 & n.71 (1984).)

The jury in *Marcus* also found that no candidate could prove he was newsworthy. The District Court found that the candidates were excluded from Iowa Public Television's *Iowa Press* program "'on the basis of independent journalistic and editorial judgments.'" 97 F.3d at 1139. These findings show the illogic of classifying "debates" separately from all other news programming – and of replacing AETN's editorial judgment with a *per se* rule that all candidates qualified for the ballot are entitled to equal news exposure.

Were a *per se* rule adopted, there would be no confining it to traditional candidates' debates. As *Marcus* shows, candidates will demand access to programs in non-debate formats such as news interview programs, because candidates may appear there face-to-face. AETN might also broadcast newscasts or panel discussions that devote time to ballot-qualified candidates deemed newsworthy, while ignoring non-newsworthy ballot-qualified candidates. So there would have to be a constitutionally based rule of equal treatment there as well.

The rule logically might be extended further to programs about ballot questions such as environmental or tax issues, especially if various interest groups can demonstrate that they have more members in the state than another group whose representatives appeared. And, if the legislature is considering controversial bills, or if a bill is sent to the governor to face possible veto, those same interest groups can again argue that their representatives should appear on-air, because AETN's editorial judgment cannot be trusted. This is precisely the kind of wider impact that this Court considered in *Heffron v. International Soc'y for Krishna Consciousness*, 452 U.S. 640, 652 (1981).

A political debate on AETN is part of news programming; and, in logic and practice, news decisions cannot be confined by the Procrustean rule Mr. Forbes seeks.

V. THE REQUIREMENT FOR AETN TO USE PREEXISTING "OBJECTIVE" CRITERIA IN SPONSORING THE DEBATE WOULD BE INCOMPATIBLE WITH FORUM DOCTRINE AND WITH AETN'S ROLE AS AN INSTITUTION OF THE PRESS.

Amici NLP and the Brennan Center argue that AETN cannot decide whom to invite to candidate debates without using a set of "objective" selection criteria that is published in advance of its use. They argue that this safeguard is necessary to prevent AETN from engaging in the sort of standardless decision-making that this Court has condemned when free speech and press rights are at issue. Their premise is that ballot qualification alone is a rational means for deciding which candidates should receive news coverage, at least when news programming is in the form of a debate. Both NLP and the Brennan Center rely on the Federal Election Commission's ("FEC's") rule (11 C.F.R. § 110.13) requiring debate sponsors, including broadcasters and newspapers, to use only "pre-established objective criteria to determine which candidates may participate in a debate." (NLP Br. at 24; Brennan Center Br. at 16, App. A (text of rule)). The Brennan Center also argues that press coverage of a candidate is an electoral benefit (Brennan Center Br. at 19), echoing Mr. Forbes' argument that the debate here is a government subsidy of private speakers. (Resp. Br. at 29)

This argument is flawed in several ways. Initially, we note that lists of "pre-established" criteria can yield varying results when applied according to the editorial judgments of different broadcasters. So the FEC's rule is more palliative than panacea.

Second, ballot qualification alone is not a sensible criterion on which to base news judgments involving candidate debates, including those sponsored by state-entity broadcasters. News decisions, whether or not involving ballot-qualified candidates, are not mathematical or mechanical. Rather, they typically involve weighing and balancing a list of factors, some predictable and others unique to the situation (and therefore not amenable to being listed in advance). This is the essence of the testimony of Ms. Howarth and Ms. Oliver, and of Iowa Public Television's program director, Daniel Miller, quoted in *Marcus v. Iowa Pub. Television*, 97 F.3d at 1143. Ballot qualification as an isolated factor is a test suited to the voting process, not to decisions about news coverage. *See also Buckley v. Valeo*, 424 U.S. 1, 101-03 (1976) (significant distinction between purpose of ballot access threshold and higher statutory threshold for general election funding).

Third, although the FEC's rule has never been tested in litigation, there are serious doubts that it could survive First Amendment scrutiny. This certainly is true as to any non-governmental press entity. If a newspaper or television station or network decided to sponsor a debate between or among federal candidates, to select the participants according to its news judgment, and to refuse to explain the basis for its decision to the FEC, that course of action would be protected under cases such as *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. DNC, 412 U.S. 94*; *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); and *Mills v. Alabama*, 384 U.S. 214. Simply put, these cases (among many others) forbid a government agency from requiring editors to justify their journalistic judgments, even if the agency seeks the justification to aid in enforcement of campaign finance laws. This is an issue of facial invalidity.

The result should be no different for state-entity public broadcasters. Whether under forum analysis or an analysis based on *League of Women Voters - Polk County*, the state-entity broadcaster is entitled to make content-based news judgments that are inherent in structuring a candidates' debate that is designed to meet the audience's interests.

Under forum doctrine, the state-entity licensee must have a reasonable basis for making its decision. *Cornelius*, 473 U.S. at 800. Reasonableness does not demand that decisional criteria be limited to factors listed earlier on a public document. Rather, it condemns invidious discrimination. Editors remain entitled to the flexibility demanded of those making news judgements in an ever-changing world. The NLP and the Brennan Center may complain about the *ad hoc* nature of the news business, but the necessity for journalists to deal with changing circumstances does not abate simply because the news program in question is in the form of a debate rather than a newscast.

Under *League of Women Voters - Polk County*, so long as the editorial process is protected from state political interference, and absent invidious discrimination, the editorial judgements of a state-entity broadcaster are entitled to the same protection as those of any other editor.

VI. THE CANDIDATES' DEBATE WAS NOT GOVERNMENT SPEECH.

Amici United States and the FCC and the State of California, *et al.*, argue that the debate should be classified as "state speech." However, a review of cases discussing "state speech" reveals that they do not apply to instances where the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a

diversity of views from private speakers." *Rosenberger*, 115 S. Ct. at 2519.[9/] Forum analysis deals with the spectrum of instances where the government invites speakers to participate in an activity, as opposed to simply issuing a government declaration. In that sense, forum doctrine bounds the "government speech" doctrine. Therefore, AETC respectfully declines to embrace the arguments advanced by the United States and the State of California on this point.

CONCLUSION

Whether this case is analyzed under forum doctrine, with its emphasis on government's intent as the key starting point in classifying the forum, or under *League of Women Voters - Polk County*, AETN's use of news judgment to select debate participants should be upheld. If the debate is treated as a

---

9/ *See also Capitol Square Review and Advisory Bd. v. Pinette*, 115 S. Ct. 2440, 2448 (1995) (distinction between government and private speech endorsing religion); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (discussing government speech on religious topics); *Keller v. State Bar of California*, 496 U.S. 1, 10 (1990) (adverting to respondent's argument based on "government speech" doctrine, that "'government may speak despite citizen disagreement with the content of its message'") (citations omitted); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990) (difference between government and private speech endorsing religion); *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 661, 664 (1989) (Kennedy, J. concurring in the judgment in part and dissenting in part) (discussing government speech about religion).

nonpublic forum, then AETN's exclusion of Mr. Forbes must be upheld because it was reasonable, was not viewpoint-based, and was not the result of invidious discrimination. If the debate is treated under *League of Women Voters - Polk County*, then AETN's editorial decision must be upheld because it did not result from, or constitute, invidious discrimination. Under either approach, AETN's legal capacity to continue making journalistic judgments would depend on its remaining insulated from state political pressure.

For the foregoing reasons, the decision of the United States Court of Appeals for the Eighth Circuit in *Forbes II* should be reversed, and the case remanded with instructions to enter judgment for defendants.

Respectfully submitted,

RICHARD D. MARKS
Counsel of Record
ALDEN L. ATKINS
PHILIP A. NICKLES
VINSON & ELKINS L.L.P.
1455 Pennsylvania Ave., N.W.
Washington, D.C. 20004-1008
(202) 639-6725

Counsel for Petitioner Arkansas Educational Television Commission

August 1, 1997